



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

December 7, 1994

Honorable Mike Driscoll
Harris County District Attorney
1001 Preston, Suite 634
Houston, Texas 77002-1891

Letter Opinion No. 94-085

Re: Whether the district clerk may file an
abstract of judgment for nonpayment of
costs (ID# 26152)

Dear Mr. Driscoll:

You ask whether the district clerk may file an abstract of judgment for nonpayment of costs. After examining the relevant statutes and rules, we conclude that the district clerk may not file such an abstract, since he is not a party to the underlying litigation and is therefore not "a person in whose favor a judgment is rendered." Prop. Code § 52.002. Rather, the clerk should follow the procedure set out in rules 129 and 130 of the Texas Rules of Civil Procedure, which direct him to prepare a certified copy of the bill of costs "and place the same in the hands of the sheriff or constable for collection."

Section 52.002 of the Property Code gives the right to apply for an abstract to "a person in whose favor a judgment is rendered." You suggest that "[a]rguably, the District Clerk impliedly is a party in whose favor a judgment is rendered." We disagree. In our view, this phrase means the prevailing party. The district clerk is not a party to civil law suits generally. The legislature, mindful that an abstract is an impediment to the free transfer of real property and may therefore not be imposed without due process of law, restricted the right to obtain an abstract of judgment to a prevailing party.

The district clerk, therefore, cannot file an abstract of judgment unless he has instituted and won an action for the unpaid costs. Absent that, there is no judgment to be abstracted.

However, the district clerk is not without a legal remedy to obtain the unpaid costs. The Texas Rules of Civil Procedure provide that the clerk may, in the event that a party responsible for costs has not paid such costs within 10 days of demand, prepare a certified bill of costs "and place the same in the hands of the sheriff or constable for collection." TEX. R. CIV. P. 129. The sheriff, in the event that the party fails to pay, may levy on the party's property "and sell such property as under execution." TEX. R. CIV. P. 130.

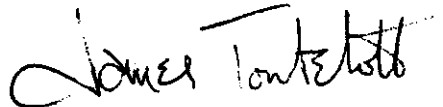
You suggest that rule 129 of the Rules of Civil Procedure "allows execution as if the District Clerk has a judgment against the party who fails to pay costs." While the practical effect of a levy and sale pursuant to rules 129 and 130 may be analogous to the

execution of a judgment, rule 129 does not create a judgment. Absent a judgment in behalf of the district clerk, no abstract may be filed.

S U M M A R Y

Absent a judgment in behalf of the district clerk in a civil action in which he is a party, the district clerk may not file an abstract of judgment in the real property records for nonpayment of costs. The district clerk's remedy for such nonpayment is that prescribed by rules 129 and 130 of the Texas Rules of Civil Procedure.

Yours very truly,

A handwritten signature in black ink, appearing to read "James Tourtelott", with a stylized flourish at the end.

James Tourtelott
Assistant Attorney General
Opinion Committee